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# Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement

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# Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement

John J. Barceló III<sup>†</sup>

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## Introduction

This article asserts that the World Trade Organization (WTO) Appellate Body's (AB) concepts and terminology concerning a claimant's burden of proof—prima facie case, presumption, and burden shifting—are disturbingly ambiguous and potentially misleading. An important task for future AB decisions should be to clarify the existing ambiguity and to develop a more conceptually sound use of burden of proof terminology. That said, even in the face of the existing ambiguity, one can make general sense of the WTO burden of proof concept through attention to the distinctive features of the WTO procedural system and by generously reading AB opin-

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<sup>†</sup> William Nelson Cromwell Professor of Law and Reich Director, Berger International Legal Studies Program, Cornell University Law School. © 2008 John J. Barceló III. All Rights Reserved.

ions. In the final analysis, the concept of overriding importance is the burden of persuasion. Although the AB formulates some decisions in ways that may raise doubts about the following conclusion, the WTO system fundamentally puts the burden of *persuasion* on the complaining member as to its basic claim of a WTO violation (and on the responding member as to any affirmative defenses) and does not shift this burden during the course of the proceeding.

In recently published scholarly works, two members of the AB, Yasuhei Taniguchi and David Unterhalter, reached this same conclusion: the burden of *persuasion* rests on the complaining member as to that member's basic claim and does not shift during the proceedings.<sup>1</sup> Both Taniguchi and Unterhalter seem to suggest, however, that the burden of *production*—not persuasion—might be described as shifting either because the claimant made out a *prima facie* case or because of a presumption.<sup>2</sup> This article argues that a shifting production burden could have meaning only in a colloquial sense (in any contest at any point in time one side or the other is “winning,” and the other side must do something to catch up), but *not* in a formal or functional sense that would have a practical effect on the proceeding. However, because the AB's burden-shifting language could easily—perhaps most naturally—be read as having a formal, functional meaning, the language can be misleading to parties and panels in future proceedings.

Thus, this article argues that the AB should abandon these concepts—*prima facie* case, presumption, and a shifting burden—in connection with a complaining member's basic claim (or a responding member's defense). The AB should simply state that a complaining member bears the burden of proof on its basic claim and that the responding member, in good faith, should submit rebutting evidence to assist the panel and support its version of the disputed facts. The reverse would hold for the responding member's defenses.

To develop this argument, Part I explains the source of the current WTO burden of proof terminology. Part II discusses how these concepts (burden of proof, *prima facie* case, and presumption) would be understood in common law and civil law systems. Against this backdrop, Part III discusses the WTO panel procedure itself and why the AB burden of proof

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1. See Yasuhei Taniguchi, *Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement*, in THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 553, 558 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008); David Unterhalter, *The Burden of Proof in WTO Dispute Settlement*, in THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES, *supra*, at 543, 544. In an earlier piece, Joost Pauwelyn also concluded that the burden of proof, understood as the burden of persuasion, does not shift from one party to the other during the course of a WTO proceeding. Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement*, 1 J. INT'L ECON. L. 227, 252–58 (1998). Note that one should not conclude that no legal system ever allows the burden of persuasion to shift. In both U.S. and German procedure the persuasion burden does in fact shift in a number of contexts, as will be discussed later in the text. See discussion *infra* Part III.

2. See Taniguchi, *supra* note 1, at 566–67, 569–71; Unterhalter, *supra* note 1, at 551.

terminology is confusing and potentially misleading. The concluding section restates the basic argument in favor of abandoning, or at least clarifying, the AB's problematic terminology.

## I. Basic WTO Concepts: Burden of Proof, Prima Facie Cases, and Presumption

Especially from a common law perspective,<sup>3</sup> but even considering how a civilian might understand concepts such as prima facie and presumption, the WTO's current articulation of its burden of proof rules generates considerable confusion. The often-cited starting point is the AB decision in *US–Shirts and Blouses*.<sup>4</sup> There the AB said the following:

[I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.*<sup>5</sup>

In other decisions, especially in *EC–Hormones*,<sup>6</sup> the AB added the

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3. Common law jurisdictions are not monolithic. The discussion in the text therefore refers only to U.S. common law practice, even though in the rest of the text the simple term “common law procedure” or “common law practice” is used without clarifying that only U.S. common law is intended.

4. Appellate Body Report, *United States–Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (Apr. 25, 1997) (adopted May 23, 1997) [hereinafter *US–Shirts and Blouses*]. Commentators often cite *US–Shirts and Blouses* uncritically, implying that it articulates an unproblematic explanation of burden of proof in WTO proceedings. For example, concerning burden of proof and *US–Shirts and Blouses*, Mitsuo Matsushita, Thomas J. Schoenbaum and Petros S. Mavroidis have commented that the decision establishes the general principle

that it is incumbent on the party challenging the conduct of another party to adduce *prima facie* evidence of facts and law to show that the conduct of the challenged party is in violation of the provision in question. When such a proof is established, the burden of proof is shifted to the party under challenge to adduce a rebuttal that the allegation of the challenging party is not based on an appropriate ground.

MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 126 (2d ed. 2006). Raj Bhala also restates the meaning of burden of proof found in *US–Shirts and Blouses*. Bhala states:

Thus the burden of proof rule has three steps to be followed *seriatim*. First, a complainant Member must present a *prima facie* case. Second, if it does, then it creates a rebuttable presumption that the measure complained of is inconsistent with the applicable rule. Third, the burden shifts to the respondent Member to rebut the presumption.

RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* 165 (3d ed. 2008). While these quoted summaries accurately reflect the language the AB used in *US–Shirts and Blouses*, one is driven to ask why, especially as a general rule of burden of proof, the burden should shift once the complaining party makes out a mere prima facie case.

5. *US–Shirts and Blouses*, *supra* note 4, at 14 (emphasis added).

6. Appellate Body Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC–Hormones*].

concept of a *prima facie* case:

The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision . . . on the part of the defending party . . . . When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States—Shirts and Blouses* . . . .<sup>7</sup>

Thus, the AB equates a claimant presenting a *prima facie* case with raising a rebuttable *presumption* in the claimant's favor.

These two leading decisions seem to say two things. First, they say that a claimant has an obligation to get beyond a certain threshold—articulated as a *prima facie* case. If the claimant presents enough evidence to get beyond that threshold, then this state of the evidence raises a presumption in the claimant's favor. Second, the decisions state that this *prima facie* case (or presumption) shifts the “burden” to the respondent. It is not at all clear, however, precisely what burden shifts.<sup>8</sup> Note that in *US—Shirts and Blouses*, the AB states that “the burden shifts,”<sup>9</sup> whereas in *EC—Hormones*, the AB actually states that “the burden of proof moves.”<sup>10</sup> It is also unclear why any burden should be shifted at the stage in which a claimant has presented a mere *prima facie* case.<sup>11</sup>

Certainly the AB's formulations are ambiguous. At least three of the AB's operative concepts need clarification: burden of proof, *prima facie* case, and presumption. In common law practice these concepts have well-developed meanings, although the meanings may vary with the context. Still, none of the normally employed common law understandings would accord with the WTO usage in the quoted decisions above.<sup>12</sup> The same could be said of the way civilians would understand this terminology. To explain further the dilemmas caused by the WTO's burden of proof formulations, the next section gives a brief synopsis of common law and civil law approaches to burden of proof. This is well-traveled terrain,<sup>13</sup> but it is useful to help explain why the AB's terminology causes serious trouble. For

7. *Id.* ¶ 98.

8. See *US—Shirts and Blouses*, *supra* note 4, at 16 (discussing the shifting of the burden, but failing to identify which burden has shifted).

9. *Id.*

10. *EC—Hormones*, *supra* note 6, ¶ 98 (emphasis added).

11. See *US—Shirts and Blouses*, *supra* note 4, at 7 (discussing the shifting of the burden after India presented a *prima facie* case, but failing to give any reasons why said burden shifts).

12. Compare RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 34-35, 1319-24 (9th ed. 2007) [hereinafter *CIVIL PROCEDURE*] (giving common law definitions for “burden of proof” and “presumptions”), with *US—Shirts and Blouses*, *supra* note 4, at 13-16 (discussing the AB's interpretation of “burden of proof”), and *EC—Hormones*, *supra* note 6, ¶¶ 110-119 (discussing the AB's interpretation of “presumptions”).

13. Joost Pauwelyn, Yasuhei Taniguchi, and David Unterhalter all give excellent and insightful discussions of many of the points discussed in this article, though their emphases, interpretations, and analyses vary from one another and from those of this essay. See generally Pauwelyn, *supra* note 1; Taniguchi, *supra* note 1; Unterhalter, *supra* note 1.

the common law, we will use U.S. practice as an example<sup>14</sup> and for civil law, the German procedural system.<sup>15</sup>

## II. Burden of Proof in Common Law and Civil Law

### A. U.S. Common Law Practice<sup>16</sup>

#### 1. *Burden of Production and Burden of Persuasion*

Burden of proof in common law practice comprises two separate concepts: i) burden of production and ii) burden of persuasion.<sup>17</sup> At the outset, both burdens rest on the party urging a particular claim.<sup>18</sup> The burden of production means that the party bearing the burden—the claimant at the outset—must present evidence to support its version of all disputed facts and all mixed questions of law and fact, such as the existence of negligence or discrimination.<sup>19</sup> The burden of persuasion means that the party bearing the burden—again, the claimant at the outset—must bear the risk that after evaluating all the evidence and arguments presented by both sides the adjudicator will be in equipoise.<sup>20</sup> In this situation, the benefit of the doubt goes to the opponent of the party bearing the persuasion burden—i.e., to the respondent on the claimant's basic claim.<sup>21</sup> Thus, the claimant bears the risk of failing to move the adjudicator past the point of equipoise.

The role of the production burden in common law is closely tied to the use of juries in civil cases.<sup>22</sup> It allows the judge to keep jury decisions within the basic bounds of rationality.<sup>23</sup> A judge will not send a case to the jury if the claimant does not meet its production burden.<sup>24</sup> The standard the judge uses is whether the claimant has presented sufficient evidence so that a reasonable juror (drawing all reasonable inferences in favor of the claimant) could decide for the claimant on all essential issues.<sup>25</sup> Authorities sometimes describe this state of evidence as one in which reasonable persons could disagree about how to decide.<sup>26</sup>

For efficiency and practicality reasons tied to the use of lay jurors, a common law trial continues from start to finish, on consecutive days, without interruption (to minimize disruption to the lives of the jurors), until the court gives the case to the jury for a decision, and the jury renders a ver-

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14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See generally CIVIL PROCEDURE, *supra* note 12, at 1308–18.

17. See *id.* at 1309 (citing JOHN M. MAGUIRE, EVIDENCE: COMMON SENSE AND THE COMMON LAW 175–77 (1947)).

18. See *id.* at 1309–10, 1313.

19. See *id.* at 1309–10.

20. See *id.* at 1311.

21. See *id.* at 1311–12.

22. Cf. *id.* at 1309–10 (describing how a judge uses the production burden to prevent a case from getting to the jury in certain circumstance).

23. See *id.* at 1310.

24. See *id.* at 1309.

25. See *id.* at 1310.

26. See *id.*

dict.<sup>27</sup> For closely related reasons, evidence is presented sequentially.<sup>28</sup> First the claimant presents its evidence, and then the respondent presents its case.<sup>29</sup> A sequential pattern allows the judge to decide, after the claimant presents his or her case, whether there is any need to continue the proceeding to hear the respondent's counterevidence.<sup>30</sup> The burden of production comes in here. At the end of the claimant's case, the respondent will typically move for a directed verdict (also called "judgment as a matter of law").<sup>31</sup> The judge will grant that motion—and consequently dismiss the case—only if the claimant has failed to meet the burden of production.<sup>32</sup> Thus, the judge will grant the respondent's motion only if the claimant has failed to produce enough evidence so that at least one reasonable person could decide for the claimant.<sup>33</sup> If the judge denies the directed verdict motion, normally the respondent will then present its case.<sup>34</sup>

Note that if the judge refuses a directed verdict motion and the respondent fails to present any evidence in rebuttal, the claimant will not necessarily win.<sup>35</sup> The judge has only decided that, on the state of the presented evidence, reasonable persons could disagree.<sup>36</sup> If the respondent presents no evidence at all and merely argues that the jury should not draw the inferences from the claimant's evidence that the claimant urges, then the jurors must decide how they will actually decide the case.<sup>37</sup> If the jury decides for the claimant, then the claimant has met both its burden of production and its burden of persuasion. If the jury instead decides for the respondent, then the claimant has met its burden of production, but not its burden of persuasion. Of course, as to the burden of persuasion, the judge tells the jury that the jury must decide for the respondent if they find themselves in equipoise on an essential element of the claimant's case.<sup>38</sup> Thus, the jury could decide for the respondent, either because they find the claimant's case simply unpersuasive, or because they find themselves in equipoise.

If a claimant presents a case that goes well beyond the basic threshold posed by the need to meet the production burden so as to be overwhelm-

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27. Hein Kötz cites this feature as perhaps the most salient distinction between common law and civil law procedure in a civil trial. See Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61, 71-72 (2003).

28. See CIVIL PROCEDURE, *supra* note 12, at 154-55.

29. See *id.* at 153-54.

30. See *id.* at 154.

31. See *id.*

32. See *id.*; see also FED. R. CIV. P. 50(a).

33. Cf. FED. R. CIV. P. 50(a)(1) (noting that the court may grant judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue").

34. See CIVIL PROCEDURE, *supra* note 12, at 154-55.

35. See *id.* at 154.

36. See *id.*

37. See *id.* at 154, 179.

38. V. C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817 (1961).

ing, then such a presentation by the claimant would be described as having shifted the production burden to the respondent.<sup>39</sup> In other words, in such a situation, if the respondent fails to present any rebuttal evidence, the respondent would lose as a matter of law.<sup>40</sup> Saying that a claimant's evidence is so strong as to shift the production burden to the respondent is also saying that on the basis of the claimant's un rebutted evidence alone, no reasonable person could *fail* to find for the claimant.<sup>41</sup> This is the standard a judge would use in ruling on a *claimant's* motion for a directed verdict if the respondent presents no rebuttal evidence after the claimant has presented its case.<sup>42</sup> If a judge grants the motion, it means that the judge has found the claimant's case to be overwhelming and effectively to have shifted the production burden to the respondent.<sup>43</sup>

Note that if the respondent does present rebuttal evidence sufficient to move the case back into a state in which there is enough conflict in the evidence for reasonable persons to disagree about the outcome, then the burden of persuasion still rests on the claimant.<sup>44</sup> A very strong claimant's case may shift the production burden, but it does not shift the persuasion burden.<sup>45</sup> Note also that if the respondent's rebuttal evidence is overwhelmingly strong, this could have the effect of shifting the production burden back to the claimant, forcing the claimant to come forward with further rebuttal evidence of its own—and so on.<sup>46</sup> Again, whether the production burden had been shifted back to the claimant would be tested by a respondent's motion for directed verdict.<sup>47</sup> The case goes to the jury only when the state of the evidence (coming from one or both sides) is such that reasonable persons could disagree about the outcome.<sup>48</sup> Thus, on the claimant's basic case, the production burden may shift back and forth between the claimant and respondent, but the persuasion burden stays with the claimant and does not shift. Other devices, such as a legal presumption, however, could have the effect of shifting the production burden—and in special cases even the persuasion burden—to the respondent, as discussed later.<sup>49</sup>

This same basic pattern prevails even if there is no jury and the judge decides the facts and the law (called a bench trial).<sup>50</sup> The judge is merely substituted for the jury as the fact finder. The trial still occurs in one continuous hearing, evidence is presented sequentially, and the claimant must meet a production burden before the respondent is called upon to rebut.

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39. See CIVIL PROCEDURE, *supra* note 12, at 1310.

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.* at 155, 1310.

47. See *id.* at 1310.

48. See *id.* at 1310-11.

49. See *infra* Part II.A.3.

50. See CIVIL PROCEDURE, *supra* note 12, at 153.



## 2. *Standard of Proof*<sup>51</sup>

For a full understanding of the common law burden of proof, one must also know what *standard of proof* the adjudicator is required to apply. In common law usage, “standard of proof” refers to the threshold of probability that must be exceeded in the adjudicator’s evaluation of the evidence in order for the adjudicator to reach judgments about the existence of historical facts and to apply legal concepts to historical facts to reach legal conclusions.<sup>52</sup> In criminal cases, the standard of proof is “beyond a reasonable doubt,” and in civil cases it is generally “preponderance of the evidence”—which typically means “more probable than not” or more than 50% probable.<sup>53</sup> Thus, a full statement of the question put to the judge on a respondent’s directed verdict motion at the end of the claimant’s case is whether, after drawing all reasonable inferences in favor of the claimant and applying the standard of more probable than not, reasonable persons could disagree about whether to find for the claimant.<sup>54</sup>

Note that although the normal standard of proof in a civil case is preponderance of the evidence, in special circumstances a higher standard of proof may be required.<sup>55</sup> This higher standard, sometimes called “clear and convincing” evidence, is probably best understood as requiring a level of probability in between “preponderance” on the lower end and “beyond a reasonable doubt” on the higher end.<sup>56</sup> The higher standard may be used in cases in which the social costs of what is conventionally called “Type I” error, finding a violation or liability where none exists, are judged to be unusually high.<sup>57</sup>

In its decisions to date, the WTO seems to have given little or no attention to the standard of proof issue.<sup>58</sup> The decisions tend to speak of whether or not the panel (or AB) is convinced by the evidence and arguments, without specifying in more detail precisely what standard of proof the panel (or AB) is applying.<sup>59</sup> In a 2008 piece, David Unterhalter, a current AB member, has speculated that a preponderance of the evidence standard applies as a general rule in WTO cases.<sup>60</sup> No AB decision to date,

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51. See generally *id.* at 1324–31; Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115 (1987). For a comparison of common law and civil law approaches to standards of proof, see Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002).

52. See, e.g., Clermont & Sherwin, *supra* note 51, at 251.

53. See Clermont, *supra* note 51, at 1119–20.

54. Cf. CIVIL PROCEDURE, *supra* note 12, at 1352 (discussing different articulations of the standard for a directed verdict).

55. See Clermont, *supra* note 51, at 1119.

56. See *id.*

57. See CIVIL PROCEDURE, *supra* note 12, at 1328–29.

58. See Unterhalter, *supra* note 1, at 551 (stating that “the Appellate Body has been somewhat agnostic as to the quantum of evidence that suffices to establish a *prima facie* case,” and that it is unclear what this standard entails).

59. See *id.* (describing a variable standard for determining when evidence establishes a *prima facie* case).

60. Cf. *id.* at 552. Unterhalter’s status as an AB member, along with his conclusion that “standard of proof is necessarily a concept cast in probabilistic terms” and that

however, has discussed standard of proof in a straightforward and clear way.<sup>61</sup> It would be helpful to have guidance from the AB on this point in a future case, especially if a standard of proof greater than preponderance is needed to protect important societal values from easy litigious attack: in other words, to protect target governments from Type I error.<sup>62</sup>

### 3. *Prima Facie Case and Presumption*<sup>63</sup>

We now turn to the meaning of prima facie case and presumption in common law practice. As the U.S. Supreme Court stated in a footnote in *Texas Department of Community Affairs v. Burdine*,<sup>64</sup> the phrase “prima facie case” may be used in two senses.<sup>65</sup> In one sense, as the words themselves imply, prima facie case means evidence merely sufficient to meet the claimant’s production burden—that is, evidence that will withstand a directed verdict motion and get the case to the jury (i.e., on the basis of which reasonable persons can disagree).<sup>66</sup> We can refer to this usage as “prima facie in the weak sense.” Prima facie in the weak sense would not mean a case that was so strong as to shift the production burden to the respondent (evidence upon which no reasonable person could fail to find for the claimant). The latter case would be an overwhelming case, not merely a sufficient prima facie case.

The second usage, as described in the *Burdine* footnote,<sup>67</sup> can be

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“there seems little reason not to adopt a standard that is clear and well understood in other contexts, the most obvious candidate being proof on a balance of probabilities” suggests that preponderance of the evidence is the general rule in WTO cases. See *id.*

61. See *id.* at 551.

62. One might understand the AB’s reasoning in *EC–Asbestos* as effectively requiring a higher standard of proof to give greater regulatory discretion to governments seeking to control health risks stemming from potentially dangerous products. See generally Appellate Body Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001). Although the AB does not speak explicitly in standard of proof terms, its discussion comes very close. For example, on the issue of “likeness” of products (asbestos compared to PCG fibres), the AB explained that Canada would bear a heavy burden to show that the products were “like” once it was clear that the products were physically different in a way that caused asbestos to pose a serious health risk (cancer) not present with the other products. See *id.* ¶ 118. Indeed the majority ruled for the EC on the ground that Canada had failed to meet that burden. *Id.* ¶ 126. Again in its analysis of the “necessity test” under Article XX(b) (to protect human, animal, or plant life or health), the AB said that if serious health consequences are potentially at stake (e.g., cancer), a regulating government would have more leeway in meeting the necessity test. See *id.* ¶ 172. Putting this point differently, one could say that the standard of proof—or of persuasiveness—needed to require a regulating government to use an alternative means to the same health end would be greater than normal.

63. See DAN B. DOBBS, *THE LAW OF TORTS* 365–69 (2000) (discussing burden of proof and presumptions in the common law); *CIVIL PROCEDURE*, *supra* note 12, at 1319–24.

64. 450 U.S. 248 (1981).

65. *Id.* at 254 n.7.

66. That this is the way prima facie is understood (at least as to its use in common law) in Pauwelyn, *supra* note 1, at 229.

67. *Burdine*, 450 U.S. at 254 n.7.

called “prima facie in the strong sense.”<sup>68</sup> This usage links the prima facie case with the concept of a “legally mandatory, rebuttable *presumption*.”<sup>69</sup> Here, the concept of a presumption has a fairly rigorous meaning and an important procedural effect. It functions in the following way. If the claimant establishes certain facts (A(1), A(2), A(3), etc.), then a legal rule intervenes to cause Fact B to be treated as established unless the respondent rebuts the existence of Fact B. That rebuttal burden could shift just the production burden to the respondent or even shift the full burden of proof on the existence of Fact B.

For example, in the well-known *McDonnell Douglas Corp. v. Green* case,<sup>70</sup> the U.S. Supreme Court held that if, in a claim of racial discrimination, the plaintiff shows that i) he belongs to a racial minority; ii) he applied for and was qualified for a job an employer sought to fill; iii) he was rejected; and iv) after his rejection, the job remained open, and the employer continued to consider applicants with his qualifications, then a legal presumption of racial discrimination arises.<sup>71</sup> This legal presumption operates to shift the production burden to the employer to come forward with evidence explaining why the employer’s actions were not racially motivated. If the employer can meet this production burden with credible evidence, the persuasion burden on the ultimate fact of racial discrimination remains on the plaintiff.<sup>72</sup>

Note that this use of a “legal presumption” alters the normal burden of proof rules. Normally, from evidence of facts (i) through (iv) above, one might say that an inference of discrimination was *permissible*, but not *required*. Usually, the production burden would shift only if the claimant’s evidentiary case is overwhelming—that is, only if no reasonable person could *fail* to draw an inference of the ultimate fact (of racial discrimination).<sup>73</sup> A court introduces the device of a “legal presumption” for social policy reasons, including perhaps a judgment that what is customarily called Type II error (failing to find discrimination where it exists) poses a greater social problem than Type I error (finding discrimination where none exists).

In certain circumstances, a court might allow a legal presumption to shift even the persuasion burden—resulting in a shift of the full burden of proof.<sup>74</sup> But the main point is that a common law court employs such a

68. Cf. Unterhalter, *supra* note 1, at 549–50 (discussing the “strict account of a prima facie case”).

69. *Burdine*, 450 U.S. at 254 n.7 (emphasis added).

70. 411 U.S. 792 (1973).

71. *Id.* at 802–03.

72. The Court in *Burdine* declared that the presumption shifts only the production burden and not the burden of persuasion. *Burdine*, 450 U.S. at 253.

73. For further discussion on burden of proof and burden of persuasion see CIVIL PROCEDURE, *supra* note 12, at 1319–39.

74. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245–48 (1989) (holding that in a gender discrimination case, if the plaintiff can show that impermissible factors—such as gender—influenced the decision to not promote the plaintiff for partnership, then the entire burden of proof shifts to the defendant to show that discrimination did not influence the decision).

“legal presumption” only in special circumstances, and it does so in part for social policy reasons and perhaps also because the respondent has greater access to relevant information (e.g., its motivation for the disputed decision). The operative effect of a legal presumption is that once the claimant shows Fact A to exist through direct proof, Fact B is always treated as established—as a matter of law, not direct proof—unless the respondent introduces evidence to rebut the existence of B.<sup>75</sup>

## B. Burden of Proof in the German Civil Law System

We turn here to a brief sketch of the German civil law approach to burden of proof, prima facie case, and presumption. As in most civil law jurisdictions (but in contrast with common law jurisdictions), a civil proceeding in Germany usually stretches over several hearings and does not involve a jury.<sup>76</sup> A second point of contrast with common law is that prior to and during any given hearing, both sides are likely to submit evidence simultaneously<sup>77</sup> rather than present evidence sequentially.<sup>78</sup>

Given these features of German trial practice, burden of *persuasion* is the key component of burden of proof. The concept of a production burden has a very limited meaning. It arises in a complainant’s basic case (and a respondent’s defense), if the facts at issue are disputed. The proponent of disputed facts—the claimant, respecting the claimant’s basic claim—must be prepared to indicate to the court what kind of evidence it will submit to prove its version of the facts.<sup>79</sup> This is known as the *Beweisführungslast*.<sup>80</sup> If the claimant is not prepared to offer probative evidence concerning an essential fact, the court will simply dismiss the claim.<sup>81</sup>

On the one hand, *Beweisführungslast* resembles, but is really quite different from, the common law burden of production. The latter tests whether the claimant’s evidence actually adduced is sufficiently strong to warrant a jury deliberation (because reasonable persons can disagree). At common law, the respondent will present evidence only if the claimant passes this test. In a German proceeding, as long as the claimant indicates that it is prepared to offer probative evidence to convince the adjudicator of the alleged facts, then, at subsequent hearings, both the claimant and the respondent normally submit evidence simultaneously.<sup>82</sup> The respondent’s evidence may seek to rebut the claimant’s facts—as to which the claimant bears the persuasion burden—or to establish facts that would constitute a defense—as to which the respondent has the persuasion burden.<sup>83</sup>

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75. This statement of course assumes that we are dealing with a rebuttable and not an irrebuttable presumption.

76. See Kötz, *supra* note 27, at 72.

77. See *id.*

78. See *id.* at 68–69, 72.

79. PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 267 (2004).

80. *Id.*

81. See *id.*

82. See *id.* at 253–59.

83. See *id.* at 267 (noting that “the party who asserts a fact favoring that party’s claim or defense has the burden of proof of that fact”).

Throughout the proceeding, the burden of persuasion captures the real meaning of burden of proof. Burden of production in the common law use of the term does not exist.<sup>84</sup>

On the other hand, German practice does include concepts of presumption and *prima facie* proof.<sup>85</sup> A presumption can arise because of a statutory provision or because of a rule derived from case decisions.<sup>86</sup> The German concept of presumption generally operates in a manner similar to the common law's strong sense of *prima facie*, as described earlier.<sup>87</sup> If the claimant proves Fact A, the law will treat Fact B as established unless the respondent rebuts the existence of Fact B. The presumption can have the effect of shifting the entire burden of proof.<sup>88</sup> For example, if the claimant establishes that a physician committed gross malpractice, the persuasion burden concerning whether the physician's improper actions caused claimant's injuries shifts to the physician.<sup>89</sup> The physician bears the full burden of proving that the gross malpractice did not cause the claimant's injuries.

If the case involves what is called *Anscheinsbeweis*, or *prima facie* proof, it again follows a pattern similar to the presumption case just described.<sup>90</sup> If the claimant proves Fact A, then the law treats Fact B as established unless the respondent rebuts Fact B.<sup>91</sup> For example, if the claimant's evidence establishes that an instrument (respondent's car) under the control of respondent hit and caused injury to the claimant while the claimant was on the sidewalk, a German judge would treat the respondent's negligence as established without requiring the claimant to show the specific way in which the respondent was negligent—unless the respondent could rebut the fact of negligence.<sup>92</sup> The rebuttal requirement might not constitute a full shifting of the burden of persuasion, however, and in this sense would be similar—but not identical—to the common law's shift of the production burden.

For example, one commentator notes that if the respondent proves that driver C, in a nearby car, forced the respondent's car off the road, then the burden of persuasion concerning whether the respondent was nevertheless negligent remains on the claimant.<sup>93</sup> One might understand this example as a case in which the respondent has shown by rebuttal proof that the conditions for the application of *Anscheinsbeweis* failed to exist. In

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84. See Pauwelyn, *supra* note 1, at 230 n.7 (noting that in civil law there is nothing similar to the common law motion practice to test whether an opponent's evidence meets a production burden).

85. See MURRAY & STÜRNER, *supra* note 79, at 269, 311.

86. See *id.* at 269.

87. See *supra* notes 67–69 and accompanying text.

88. See MURRAY & STÜRNER, *supra* note 79, at 268.

89. See *id.*

90. See *id.* at 310–11.

91. See *id.*

92. *Id.* at 267. This example is similar to the way in which the common law doctrine of *res ipsa loquitur* operates; except that at common law, *res ipsa loquitur* normally only meets the claimant's burden of production without shifting the burden of production to the respondent. See generally DOBBS, *supra* note 63, at 370–81.

93. WALTER ZEISS, ZIVILPROZESSRECHT 183 (1971).

other words, the case did not meet the requirement that, in the ordinary course of events, the accident would not have happened absent the respondent's negligence. The respondent bears the full burden of proof as to driver C's presence and actions. If the respondent succeeds, however, the burden of proof as to whether the respondent was nevertheless negligent still rests on the claimant.

### III. Burden of Proof in WTO Jurisprudence

#### A. The Problematics of Prima Facie Case and Presumption

Against this background, it should be evident why the AB's burden of proof formulations in *United States—Shirts and Blouses*<sup>94</sup> and other decisions pose interpretive dilemmas.<sup>95</sup> The AB says that the burden of proof on any claim of a WTO violation rests initially on the claimant.<sup>96</sup> Then, if the claimant adduces evidence sufficient to raise a presumption that its allegations are true, the "burden" shifts to the respondent to rebut the presumption.<sup>97</sup> The respondent will fail if it does not meet this rebuttal burden.<sup>98</sup> In *EC—Hormones*, the AB treats a prima facie case established by a claimant as the equivalent of a case that raises a presumption in the claimant's favor.<sup>99</sup> If the claimant establishes a prima facie case, then the "burden of proof moves" to the respondent.<sup>100</sup>

Faced with these formulations, one may justifiably ask: what burden shifts to the respondent? Is the burden that shifts only something like the common law production burden, or does it include both the production and persuasion burdens? Moreover, why should either burden shift? A prima facie case in the common law "weak sense" would mean only that an inference in favor of the claimant is permissible, not *mandatory*. It would normally mean, as the words *prima facie* imply, that the complainant has met a minimum required threshold of proof. A prima facie case, however, would not shift the production burden, and it would certainly not shift the burden of persuasion.

In *EC—Hormones*, the AB links a prima facie case with establishing a presumption.<sup>101</sup> To a common law lawyer, this linkage might suggest that the AB is equating presumption with the common law's *strong* prima facie case described previously,<sup>102</sup> so that raising a presumption—by presenting a strong prima facie case—would effectively shift either the production burden or the full burden of proof. Something similar might be said from a civil law perspective if one were to understand the AB's use of presumption

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94. See generally *US—Shirts and Blouses*, *supra* note 4.

95. See generally Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18, 1999).

96. *US—Shirts and Blouses*, *supra* note 4, at 14.

97. See *id.*

98. *Id.*

99. See *EC—Hormones*, *supra* note 6, ¶ 98.

100. *Id.*

101. See *id.*

102. See *supra* notes 67–69 and accompanying text.

as having the German civil law meaning or as the equivalent of the German *Anscheinsbeweis*. However, in the common law and civil law usages just described, a presumption is an exceptional device, not one that operates as part of the everyday burden of proof rules for ordinary cases. Moreover, having common law or German civil law concepts in mind, one would be inclined to ask for further clarification—in particular, what precise facts (A(1), A(2), A(3), etc.) must a WTO claimant show to trigger a presumption that would treat Fact B (in context, presumably a WTO violation) as provisionally established. The AB decisions do not speak in these terms. Furthermore, one would want to know whether the presumption shifts only the production burden or also the persuasion burden.

## B. Prima Facie and Presumption in DSU Article 3.8

A comparison with the way the prima facie and presumption concepts operate in DSU Article 3.8 is instructive. DSU Article 3.8 provides:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.<sup>103</sup>

Here, the prima facie and presumption concepts fit both the common law's strong prima facie case and the German law's use of prima facie proof (*Anscheinsbeweis*) and presumption. Article 3.8 provides that if the claimant shows Fact A (e.g., that the respondent has violated a covered agreement), then this constitutes prima facie proof of the existence of Fact B (nullification or impairment of a benefit). Put another way, showing Fact A gives rise to a presumption that Fact B exists. The presumption's effect puts the burden on the respondent to rebut the existence of Fact B (nullification or impairment of a benefit).

Article 3.8 does not exactly clarify what the rebuttal requirement entails. Does the rebuttal requirement shift only the production burden or also the burden of persuasion (the full burden of proof)? Because the concept of a production burden in a WTO proceeding is relatively meaningless, as will be explained below, we can assume that Article 3.8 intends to shift to the respondent the full burden of proof on nullification or impairment of a benefit.<sup>104</sup>

The well-known *Superfund* case<sup>105</sup> illustrates why subsequent deci-

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103. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

104. See *infra* notes 106–112 and accompanying text.

105. Report of the Panel, *United States—Taxes on Petroleum and Certain Imported Substances*, L/6175 (June 17, 1987), GATT B.I.S.D. (34th Supp.) at 136 (1987) [hereinafter *Superfund*].

sions have not clarified this issue. This pre-WTO case arose under Article XXIII of the 1947 General Agreement on Tariffs and Trade<sup>106</sup> (GATT) and involved an admitted violation by the United States of Article III's national treatment obligation concerning internal taxes.<sup>107</sup> The United States taxed imported oil more (but only slightly more) than domestic oil.<sup>108</sup> Because the *Superfund* case defined the "benefit" in the phrase "nullification or impairment of a benefit" as the right under Article III to an equal "competitive relationship" between imported and domestic goods (instead of altered trade flows), the violation of Article III was the same as denial of an equal competitive relationship.<sup>109</sup> Thus, the presumption of a "nullification or impairment of a benefit" became by definition an irrebuttable presumption.<sup>110</sup> Furthermore, because the denied "benefit" in most GATT and WTO disputes is the benefit of having an equal "competitive relationship,"<sup>111</sup> a violation of a covered agreement automatically becomes a "nullification and impairment of a benefit."<sup>112</sup> Rebuttal is impossible, and thus one never learns whether the prima facie and presumption concepts in DSU Article 3.8 shift the full burden of proof.

It could well be that in *US-Shirts and Blouses*<sup>113</sup> the AB borrowed the prima facie and presumption concepts (and their shifting of a rebuttal burden to the respondent) from Article 3.8. The opinion makes clear, however, that the AB understood that the issue in *US-Shirts and Blouses* was not the same as the issue addressed in Article 3.8.<sup>114</sup> In Article 3.8, the issue is whether a violation of a covered agreement produces a "nullification or impairment" of a benefit; whereas, in *US-Shirts and Blouses*, the issue was whether a violation of a covered agreement existed in the first place.<sup>115</sup> Nevertheless, the AB may well have borrowed the concepts and applied them in a context where they do not fit. Under Article 3.8, prima facie and presumption concepts make sense. They apply where the claimant establishes Fact A (a WTO violation) so that Fact B (nullification or impairment) is presumed to exist unless the respondent can establish non-B. In *US-Shirts and Blouses*, the first step—the existence of Fact A—is the only issue. *US-Shirts and Blouses* does not fit the binary fact pattern for which a presumption is appropriate—showing A raises a presumption of B. Applying prima facie and presumption concepts when only Fact A is in dispute, and has not been previously established, leads to confusion.

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106. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

107. See *Superfund*, *supra* note 105, ¶ 3.1.1.

108. *Id.* ¶ 3.1.2.

109. See *id.* ¶ 5.1.9.

110. See *id.*

111. *Id.*

112. *Id.*

113. See *US-Shirts and Blouses*, *supra* note 4, at 13.

114. See *id.* at 13-14.

115. See *id.*



### C. A Generous Interpretation

On reflection, it seems unlikely that the AB intends anything radical in its burden of proof formulations in *US-Shirts and Blouses*, *EC-Hormones*, and other decisions. Overall, its decisions have been cautious and text-bound—a tendency that is fully understandable for a young adjudicatory body that has exceptional responsibility for adjudicating intergovernmental disputes over sometimes very politically charged regulatory policies. To make sense of the AB's burden of proof terminology, it helps to have in mind the uniqueness of the WTO panel procedure. What follows is a brief synopsis of that procedure.

#### 1. Multiple Hearings and the Simultaneous Submission of Evidence

First, WTO panels operate under strict time constraints imposed by the DSU.<sup>116</sup> In this system, after the initial pleading stage, both sides generally submit evidence and arguments simultaneously—usually in written form—and not in ordered sequence as in common law (where claimant submits first, then respondent).<sup>117</sup> The claimant must initiate the proceeding with a formal statement of claim, which is usually accompanied by written supporting evidence in the form of appendices attached to the claim.<sup>118</sup> The respondent has two to three weeks to file a response, which is also accompanied by written evidence contained in appendices.<sup>119</sup> Thus, at the pleading stage, both sides will have already submitted evidence. After the pleading stage, both sides usually submit further evidence and arguments simultaneously (in contrast to the common law's ordered sequence).<sup>120</sup>

The panel procedure does not contain anything like the common law's formal motion practice to test the sufficiency of the claimant's evidence at any point in the procedure. After the pleading stage, it is understood that the claimant may submit additional written evidence in response to the respondent's evidence, assertions, and arguments and to questions from the panel.<sup>121</sup> At the first hearing, both sides comment on and contest the other side's presentations and arguments, and the panel poses questions to each side.<sup>122</sup> Afterwards, the two sides will simultaneously present further supporting documentation and legal argument responding to the panel's questions and to the assertions each side has made about the other side's case.<sup>123</sup> After a second hearing, the panel may or may not request or permit further written submissions.<sup>124</sup>

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116. See DSU arts. 3.12, 12.8.

117. See *id.* art. 12.6, app. 3, paras. 4, 7.

118. See *id.* art. 12.6, app. 3.

119. See *id.* art. 12.6, app. 3, para. 12.

120. See *id.* art. 12.6. See generally *id.* app. 3.

121. See *id.* app. 3, para. 7.

122. See *id.* app. 3, para. 5.

123. See *id.* app. 3, paras. 7, 8.

124. See *id.* app. 3, paras. 8, 12 (discussing proposed timetable for panel work, noting that the calendar "may be changed in the light of unforeseen developments," and allowing for additional meetings with the parties).

The panel will then render its decision, initially in a draft preliminary ruling and, after receiving the parties' comments, in a final ruling.<sup>125</sup> At no point in this procedure will a panel issue a specific ruling on the narrow question of whether the claimant (or respondent) has met its production burden.<sup>126</sup> Instead, the panel in its deliberations decides which party prevails on which issues—presumably taking into account which side bears the burden of persuasion on each issue.

## 2. Only Burden of Persuasion Matters and It Does Not Shift

With this procedural background in mind, a generous reading of the AB's burden of proof formulations might be articulated in the following way. In saying that the claimant has the burden of presenting a prima facie case that raises a presumption of its correctness, the AB is only trying to capture the claimant's basic responsibility to present a reasonably plausible case—the common law's weak prima facie case. In a time-constrained process in which evidence is not presented in an ordered sequence, but rather simultaneously, at consecutive points in the process, and in response to questions from the panel and presentations from the other side, there is no point at which a panel is asked to decide formally whether the claimant has met its burden of production. Instead, the overriding issue is the burden of persuasion, which at the panel's deliberation stage effectively absorbs any concept of a production burden. If after the parties have presented all their evidence and arguments the panel is unpersuaded or in equipoise, the party with the persuasion burden loses.

What then, one might ask, of the AB's burden-shifting terminology in *US—Shirts and Blouses* and *EC—Hormones*? In some AB formulations, one gets the impression that the persuasion burden, itself, shifts to the respondent, but this interpretation would seem to be a misunderstanding of the AB's intent. Nothing in its reasoning or analysis would justify such a shift. Instead, what the AB appears to mean is that a loose kind of production burden, which is never formally tested, shifts. It is probably a misnomer even to speak of it as a burden.

Thus, for the AB to state that a claimant must make out a prima facie case that raises a *presumption* in its favor could simply be an imprecise way of saying that the claimant must introduce enough evidence and argument to raise a presumption of correctness in the colloquial sense—a reasonable person could agree with the claimant, though such a person would not be forced to do so. Furthermore, to say that the burden would then shift to the respondent to rebut the claimant's case could just be an imprecise way of saying that a respondent has a good faith obligation to come forward with countering evidence throughout the proceeding, and if the respondent

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125. See generally *id.* app. 3, para. 12 (describing the working procedures of the panel in a timetable format).

126. See generally *id.* app. 3.

does very little in this regard it will probably lose as a practical matter.<sup>127</sup>

Admittedly, a number of panel and AB decisions use language that is difficult to square with this suggested generous interpretation of *US-Shirts and Blouses*.<sup>128</sup> In fact in *EC-Hormones*, after first equating a *prima facie* case with the claimant's initial burden as described in *US-Shirts and Blouses*, the AB goes on to say the following: "It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>129</sup> It seems impossible to square this language—if taken at face value—with the suggested generous interpretation above. In *EC-Hormones*, a *prima facie* case seems to be a decisive case, one that is overwhelming and that will yield a claimant victory as a matter of law unless "effectively refuted."<sup>130</sup> Surely, however, a claimant is not required in every case to present overwhelming proof instead of merely a plausible case as part of its initial production burden. So what then does *prima facie* case mean in the prior formulation? If the AB uses it to mean a case that invokes a *legal presumption* (proving Fact A causes Fact B to be taken as presumptively established), then what exactly is the required proxy proof (what is Fact A)? Moreover, why does the presumption device operate in every WTO proceeding, not just in special cases where social policy reasons call for it? Finally, what burden, exactly, is shifted?

These questions are not so pressing, however, if the difficult language in *EC-Hormones* is not taken simply at face value. In a later case, *Canada-Aircraft*,<sup>131</sup> the AB employed precisely the same language, but then offered further explanation that casts that language in a very different light. In *Canada-Aircraft*, the panel asked Canada to provide certain information on the financing of an aircraft transaction, but Canada refused on the ground that the complainant, Brazil, had not made out a *prima facie* case.<sup>132</sup> Bearing that context in mind, the AB repeated the ambiguous language from *EC-Hormones* and added further discussion:

A *prima facie* case, it is well to remember, is a case which, in the absence of effective refutation by the defending party (that is, in the present appeal, the Member requested to provide the information), requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. There is . . . nothing in either the DSU or the SCM Agreement to support Canada's assumption [that it need not provide the requested information if Brazil has not first made out a *prima facie* case]. To the contrary, a panel is vested with ample and extensive discretionary authority to deter-

127. Both Taniguchi and Unterhalter appear to favor this colloquial understanding of the AB's burden-shifting language. See Taniguchi, *supra* note 1, at 566-67, 571; Unterhalter, *supra* note 1, at 551.

128. See, e.g., *EC-Hormones*, *supra* note 6, ¶¶ 103-104.

129. *Id.* ¶ 104 (citing *US-Shirts and Blouses*, *supra* note 4, at 14, as support for the quoted text) (emphasis added).

130. See *id.*

131. See Appellate Body Report, *Canada-Measures Affecting the Export of Civilian Aircraft*, ¶ 192, WT/DS70/AB/R (Aug. 2, 1999) [hereinafter *Canada-Aircraft*].

132. *Id.* ¶¶ 78-83.

mine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining . . . Member has established its complaint . . . on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming . . . Member . . . has established a *prima facie* case . . . .<sup>133</sup>

From this discussion, it seems that the AB is using *prima facie* case to mean simply a plausible case for the complainant. The claimant must make out that plausible case. The AB has ruled that a panel should not use its independent fact-finding power to make out a *prima facie* case for the claimant.<sup>134</sup> But the *Canada–Aircraft* discussion demonstrates that the AB expects both sides to submit evidence and information for the panel's evaluation and that the panel may need information from both sides to decide whether the claimant has a plausible case—or better put, whether it has a winning case in the end. These submissions of evidence and argument occur at consecutive points in the process and even simultaneously from both sides. So the AB's reference to a burden shifting to the respondent seems best understood as a way of saying that if the claimant makes out a plausible case, the respondent will lose (or will probably lose) unless it rebuts that case. It is only at the panel's final ruling that we learn whether the claimant's case, in light of any rebuttal evidence from the respondent, was nevertheless convincing enough to win. Given that the panel never performs a separate test to determine whether the claimant has met the production burden, the production burden is effectively merged into the persuasion burden, and it is the latter concept that dominates the panel's decision-making process.

### 3. *The Lingering Risks of Ambiguity*

#### a. Excessive Burden on the Complaining Member

Of course, the availability of a generous interpretation that can make sense of the AB's burden of proof terminology does not cure the problem. The risk that a future panel will not settle upon such an interpretation and instead will take the AB's burden of proof language at face value remains. Two different and opposite errors would then be imaginable. A future panel might employ the AB's burden of proof language to impose an excessive burden of proof on the complaining member. This excessive burden could result were the panel to require a claimant to make such a strong case that the claimant simply must win if the respondent does not rebut. Common law would describe such a case as an overwhelming case. It is pre-

133. *Id.* ¶ 192.

134. See Appellate Body Report, *Japan–Measures Affecting Agricultural Products*, ¶¶ 129–130, WT/DS76/AB/R (Feb. 22, 1999). A related point is that a complainant may not simply place a complicated piece of the respondent's legislation before the panel and expect the panel to analyze for itself what part of that legislation is relevant to the claimant's argument. See Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 140, WT/DS285/AB/R (Apr. 7, 2005). The claimant must spell this out, or otherwise it has not met its burden of proof. See *id.* ¶¶ 140–141.

cisely this kind of case that shifts the burden of production in common law.<sup>135</sup> Thus, a panel might understand a *prima facie* case as requiring a strong—overwhelmingly strong—case, and without such an overwhelming case, the panel might simply decide for the respondent.

What should a panel do instead? Assuming that preponderance of the evidence is the applicable standard of proof, a panel should consider the evidence from both sides, decide whether it is more probable than not that the historical facts are as the claimant alleges, and—once having determined the historical facts—decide whether the necessary legal conclusion (a mixed question of law and fact) follows. If the panel is in equipoise and cannot make up its mind, then the claimant loses.

In trying to apply a concept of a *prima facie* case that raises a presumption in favor of the claimant and shifts a rebuttal burden to the respondent, a panel might look for evidence favoring the claimant that is so strong that no reasonable person could fail to find for the claimant. However, that would require too much from the claimant. Still, some of the AB decisions are open to this kind of misreading.

#### b. Excessive Burden on the Responding Member

Conversely, the AB's terminology could mislead a future panel into requiring too much from a respondent. If a future panel reads *prima facie*, as the term implies, as requiring that a claimant's case meet a minimum threshold of plausibility that would justify (but not require) a decision in the claimant's favor, such a weak *prima facie* case should not shift the burden of proof to the respondent. In such a situation, a respondent who fails to present rebuttal evidence (and merely argues against drawing the inferences the claimant urges) should not automatically lose. The test for whether the claimant wins should be whether, after evaluating the claimant's evidence (and any rebuttal evidence the respondent presents) and drawing what inferences the panel considers appropriate, the panel concludes that it is more probable than not that the claimant has established its alleged historical facts and mixed law/fact legal conclusions. If the panel is in equipoise, the claimant, who bears the burden of persuasion, loses. In the face of the AB's ambiguous language, however, a future panel could decide that once the claimant makes out a weak *prima facie* case, the full burden of proof shifts to the respondent. This interpretation would unfairly burden the respondent.

### Conclusion

To summarize, one can read the AB decisions on burden of proof—albeit by employing a considerable amount of interpretive generosity—as saying that the burden of persuasion, which is the key concept, rests on the claimant as to the claimant's basic claim of a WTO violation and does not

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135. See *CIVIL PROCEDURE*, *supra* note 12, at 1310 ("Sometimes the plaintiff's evidence may be overwhelming, so that the judge will hold that no reasonable juror could fail to find A.").

shift during the course of the proceeding. But such a reading is not self-evident. Without more clarity, the current ambiguity that attends the AB's burden of proof formulations can lead to serious misunderstandings and errors, especially at the panel level. Those errors might disadvantage either side in a litigated dispute. A panel might understand the concept of prima facie case to require a much too overwhelming level of proof from the claimant because, after all, such a case seems to have serious consequences for what is required of the respondent in rebuttal. Conversely, a different panel might allow a rather weak claimant's case to meet the prima facie requirement and then effectively reason that the full burden of proof is shifted to the respondent. These effects might even occur inside the panel's conference room without being expressed in the panel's published decision or otherwise coming to light.

The upshot then is that the AB should clarify the ambiguity that the *US-Shirts and Blouses* and *EC-Hormones* formulations created. It should clarify what exactly it means by burden of proof, prima facie case, and presumption. If the generous interpretation offered earlier is correct, then the AB's future decisions could articulate that more clearly, clarifying the confusing discussion of a presumption that shifts an "onus" to the respondent. The AB could abandon altogether the concepts of prima facie and presumption—which seems to be the preferable choice—or the AB could interpret these concepts in the "generous" way suggested here so as to render them essentially inoperative. Alternatively, if the generous interpretation suggested here is not correct, then one would hope that the AB would not wait long before explaining more clearly its understanding of the concept of burden of proof in the WTO system and the reasoning that supports that understanding.

